

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220626 **DATE:** January 23, 1986
MATTER OF: Nova Group, Inc.

DIGEST:

Evidence of the authority of the surety's agent to sign bid bond on behalf of the surety must be furnished prior to bid opening, and failure to furnish it renders bid nonresponsive.

Nova Group, Inc. (Nova), protests the Army's award of a contract under solicitation No. DABT11-85-B-0088 to the next low bidder, alleging that its own bid was improperly rejected as nonresponsive.

We deny the protest.

The solicitation was for the installation of high temperature water lines at Fort Gordon, Georgia. The invitation for bids (IFB) required each bidder to submit with its bid a bid bond in the amount of 20 percent of the bid price. The solicitation further advised that failure to furnish a bid guarantee in the proper form and amount by the time set for bid opening might cause the bid to be rejected.

When bids were opened on September 24, 1985, Nova was the apparent low bidder. However, the Army rejected Nova's bid as nonresponsive, having determined that the bid guarantee was improper. Nova's bid was accompanied by a bid bond that listed Nova Group, Inc. as principal and Safeco Insurance Company of America (Safeco) as surety. In the space provided for the surety, the bond bore the seal of Safeco and the signature of Terry J. Moughan, who was identified as "Attorney-in-Fact." Although Safeco had attached a power-of-attorney form to its bond identifying a number of persons with this authority, Mr. Moughan's name was not among those listed. The contracting officer determined that the liability of the surety on the bond was uncertain because there was nothing to show that

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Mr. Moughan had authority to act on behalf of the company and rejected Nova's bid. Award was made to the next low bidder on September 30.

The protester reports that upon receiving the contracting officer's determination, it immediately notified Safeco and that the surety then notified the contracting officer by mailgram that Mr. Moughan did indeed have authority to execute the bond.

Nova argues that the bid bond was on its face fully enforceable and binding on the surety because it clearly identified the principal, the surety, the amount, and the project. Further, Nova argues that the October 4 mailgram confirmed the already existing authority of Mr. Moughan to bind the surety, and that Mr. Moughan's signature on the bond was binding because of that authority. The protester contends that neither the surety nor the bidder had any option to decide after bid opening whether to be bound. The protester concludes, therefore, that Nova and its surety were bound to the terms of the bid guarantee, that the bid bond was fully enforceable, and that Nova's bid was fully responsive to the terms of the IFB.

The Army argues that the protester's failure to provide documentary evidence at the time of bid opening that Mr. Moughan was authorized to bind the surety represented a defect that could not be cured after bids were opened, and that the bid had to be rejected as nonresponsive.

An IFB provision calling for a bid guarantee is a material requirement that must be met at the time of bid opening, the purpose of which is to assure that the successful bidder will execute the contract and provide the necessary payment and performance bonds. Consolidated Technologies, Inc., B-215723, Dec. 7, 1984, 84-2 CPD ¶ 639. A bid which is nonresponsive due to the lack of an adequate bid guarantee cannot be made responsive by furnishing the guarantee in proper form after bid opening. AVS Inc., B-218205, Mar. 14, 1985, 85-1 CPD ¶ 328.

Nova argues that the omission of evidence of Mr. Moughan's authority was a "minor informality" which Nova should have been permitted to correct. In support of this argument, Nova cites two recent decisions of our Office, Zinger Construction Co., Inc., B-214812, July 10, 1984, 84-2 CPD ¶ 38, and Sevcik-Thomas Builders and Engineers Corp., B-215678, July 30, 1984, 84-2 CPD ¶ 128,

for the principle that "while submission of proof of bidding authority before or at the time of bid opening is encouraged in order to avoid challenges from other bidders and problems of proof before the contracting officer, it is permissible to furnish proof of an agent's authority to execute bid bonds after opening."

These decisions are inapposite to the legal issue presented here. Zinger and Sevcik-Thomas both concern the issue of whether a bid bond is valid without evidence of the authority of the principal's representative to sign the bond. Our reason for reaching this conclusion with respect to a bidder's agent is that the government would have a possible cause of action against an unauthorized agent if the alleged principal disavowed the agent's authority after bid opening. Hence, we concluded that any false disavowal of the agent's authority after bid opening would not go unchallenged by the agent because of the agent's potential liability to the government. See 49 Comp. Gen. 527 (1970). The concern in those cases is different from that presented here, where the absent evidence pertains to the authority of the surety's representative. It seems to us that the relevant inquiry is whether the alleged defect materially affects the surety's obligation to the government since the purpose of the bond is to obtain the liability of the surety to the government. See General Ship and Engine Worker, Inc., 55 Comp. Gen. 422 (1975), 75-2 CPD ¶ 269. Here, it was not an agent of the principal whose authority was in question, but an agent of the surety.

We recognize that according to the record before us, Mr. Moughan had actual authority to bind the bidder on the bond. This does not vindicate the protester's position, however, since the issue here is not Mr. Moughan's actual authority to bind the surety, but whether it appeared from the face of the bid documents that his signature on behalf of the firm was authorized and binding. Based solely on those documents, it seems that it was not. In order to establish otherwise, cooperation from the surety--the very party to be bound--was required. Since the responsiveness of a bid must be determined solely from the bid documents, the fact that extrinsic evidence may later have established that the attorney-in-fact's signature was authorized is of no consequence, notwithstanding the fact that the evidence was in existence at the time of bid opening. See Hydro-Dredge, B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400.

Accordingly, we find that it was proper for the Army to reject Nova's bid as nonresponsive because of the deficiency of its bid bond.

The protest is denied.

for Seymour E. Van
Harry R. Van Cleve
General Counsel